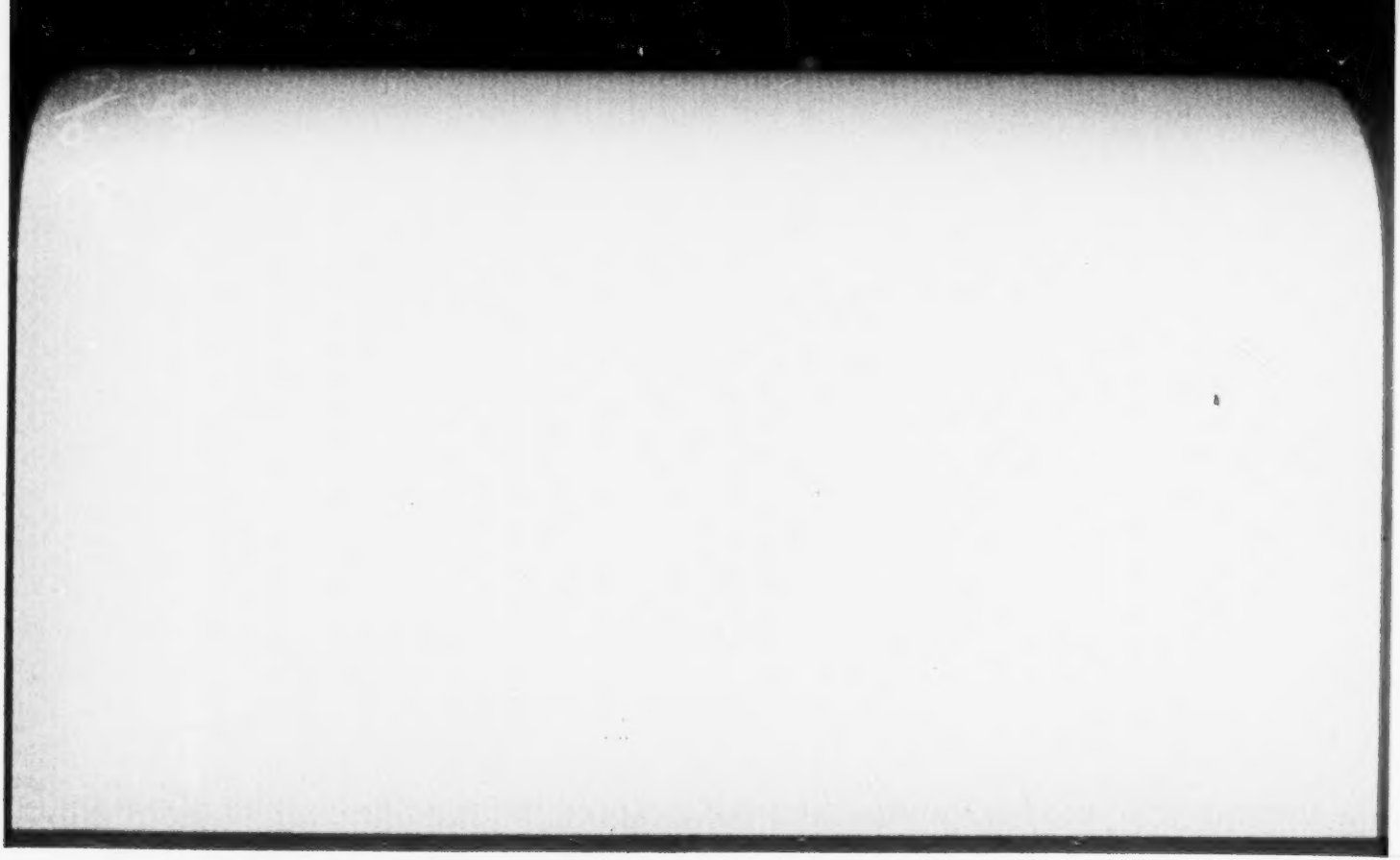

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 60.

AARON BRADSHAW, PLAINTIFF IN ERROR

vs.

MARY M. ASHLEY, EMMA B. JENKINS, HAYDEN H. ASHLEY, AND RALPH B. ASHLEY, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action of ejectment brought by Nehemiah B. Ashley against the plaintiff in error to recover an undivided interest in four lots of ground in square 939, in the city of Washington. After the case was brought to this court the defendant in error died intestate as to real estate in the District of Columbia, and the present defendants in error are the heirs-at-law of said Nehemiah B. Ashley.

The trial of the case lasted several weeks, and was taken up mainly with matters which became unimportant in consequence of the conclusions reached by the court after all the evidence had been introduced.

The controversy originated in an attempt on the part of the plaintiff in error and his associate, Walter, to take advantage of an ambiguity in the description of the lots in question growing out of the following facts:

The city of Washington comprises about 1,274 squares, all of which, except eight of irregular shape, are divided into lots and numbered according to a uniform system, beginning for lot one at the southeast corner of each square, and proceeding thence, and in consecutive and numerical order, first west, thence north, thence east, and thence south, to the place of beginning. This division into lots and squares was made by the Commissioners, representing the United States Government, and the original proprietors, and is evidenced by separate sheets of paper, one for each square, signed by the parties named, known as certificates of division, which certificates are also copied into certain bound volumes, designated in the certificates as "square records," the fact and place of record in these volumes of each certificate being indorsed upon the certificate itself.

The original certificate of division of square 939 differed from all other certificates of division in that it contained two sets of numbers—one in ink, beginning at the southwest corner of the square, proceeding thence north, thence east, thence west, and thence south, in departure from the uniform system of numbering all other rectangular squares, and the other series of numbers in pencil, beginning with the southeast corner of the square and proceeding thence west, thence north, thence east, and thence south, in conformity with the uniform system of numbering. Both the register of squares produced from the office of the commissioner of public buildings and grounds and the record of squares produced from the surveyor's office show also this same double numbering, in ink and pencil, of the lots in square 939. (See map opposite page nine of the record.)

At the trial the plaintiff's evidence tended to prove the three following independent grounds of recovery:

(1.) That the pencil numbers were the true numbers, and that, if that were the case, the plaintiff had a good record title to all the lots in controversy.

(2.) That the plaintiff and those through whom his title was derived had been in continuous, exclusive, and hostile possession for over twenty years, so as to give him a good title by adverse possession.

(3.) That, if the plaintiff and those under whom he claimed had had less than the requisite twenty years' possession, still they had been in continuous, peaceable possession for a number of years prior to the defendant's entry, and that the defendant was a mere intruder, against whom the plaintiff need show no higher title than that presumed from prior possession.

The learned justice presiding at the trial admitted testimony under each of these three several grounds of recovery asserted by the plaintiff, under objection, subject to the defendant's right to move to strike out at the close of the trial, and subject to the court's rulings upon the admissibility and sufficiency of the testimony at that time. At the conclusion, the defendant having offered no testimony tending to show title in himself, the plaintiff rested his case wholly upon the last of the three above enumerated grounds.

As to the general nature of the questions relating to the controversy about the ink and pencil numbers, we refer to the opinion of the Court of Appeals in this case (Rec., pp. 162, 163). The testimony relied upon by the plaintiff to show twenty years' adverse possession will be found on pages 33 to 79.

The fact that so much space in the bill of exceptions was taken up with matters which became wholly immaterial arose in the following manner: The defendant Bradshaw and John H. Walter, under whom he claimed, had had

placed upon the land records of the District a large number of deeds which purported to transfer title to these lots and to a great many other lots on Capitol Hill, in Washington, from persons who in the deeds assumed to be the heirs of George Walker, who was the owner of the land embraced in the suit when the city of Washington was laid out. It was assumed by the plaintiff's counsel that at least some pretense of an effort would be made by the defendant at the trial to show that he had in fact a title derived from some of the heirs of said Walker; and during the trial Bradshaw's counsel prevailed upon the court to allow some of these deeds to go in evidence upon the assurance made by counsel to the court that evidence of this kind would be offered at a later stage of the trial. We quote from the bill of exceptions (Rec., p. 123) what occurred in this connection:

"Counsel for defendant further stated that the defendant would show what investigations had been made in England and what birth and marriage certificates had been found—everything the defendant has in that direction to show that this is a genuine contention of genuine heirship—and its sole purpose is, aside now from the question of the actual possession, to meet the assertion of counsel for plaintiff that defendant is a trespasser and intruder.

"The court thereupon admitted the proof to go in, with leave to plaintiff's counsel subsequently to make a motion to strike out if they see proper" (123).

After the deeds had all been put in evidence, however, Bradshaw and Walter, who had theretofore attended the trial, left the court-room and neither of them was examined, nor was any evidence offered tending to show that any of the grantors in the deed in question were or claimed to be the heirs of George Walker, or that either Bradshaw or Walter had any reason to believe they were such heirs. Thereupon the plaintiff's counsel asked and the court gave to the jury the instruction, found on page 140 of the record, by which in substance the jury were told that it was imma-

terial whether the plaintiff had made out his paper title or not, or whether he had made out a title by twenty years adverse possession; that if the plaintiff and those under whom he claimed had been in actual possession of the property under a claim of title before the defendant entered and the plaintiff had never abandoned his claim of ownership, he was entitled to a verdict in his favor. This instruction was based upon the fact, undisputed when the evidence was closed, that the defendant was a mere intruder, without any honest claim of title whatever.

The plaintiff having obtained a verdict, the case was taken by the defendant to the Court of Appeals on bill of exceptions, and that court having affirmed the judgment, the case was brought here by writ of error. The only question raised by the bill of exceptions and the only one considered by the Court of Appeals was whether the instruction just referred to was correct, and it is therefore the only question which we shall discuss here.

On page 21 of the brief filed herein on behalf of the plaintiff in error are seven so-called assignments of error. Those numbered one, two, and three relate to the controversy about the ink and pencil numbers of the lots. Those numbered four, five, six, and seven refer to instructions given by the court to the jury. No one of these assignments of error complies with the rule of this court, which expressly provides that when the error alleged is as to the charge of the court "the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused" (rule 21).

These assignments of error do not even refer to the page of the record where the instructions to which they refer are to be found. We call the attention of the court to this plain violation of the rule and submit the matter to it for such action as to it may seem proper.

ARGUMENT.

In an action of ejectment, where the defendant shows no title in himself, but stands in the position of a mere intruder, the plaintiff is entitled to recover upon showing that before the defendant's entry he had been in possession claiming title, and that that claim of title had not been abandoned.

That this is the law has been settled by a long line of decisions in this court.

In Ricard *vs.* Williams, 7 Wheaton, 105, Mr Justice Story, in delivering the opinion of the court, said: "Undoubtedly if a person be found in possession of land, claiming it as his own in fee, it is *prima facie* proof of his ownership and seisin of the inheritance."

In Hickey's Lessee *vs.* Stewart, 3 How., 759, which was an action of ejectment, this court said:

"To enable the defendants in this case to defend their possession successfully, upon their own title, that title must be shown to be a good and subsisting legal title, and superior in law to that set up by the plaintiffs; otherwise it opposes no legal bar to the recovery in the action of ejectment. * * *

"The defendant in ejectment can never defend his possession against the plaintiff upon a title in himself by which he could not recover the possession if he were out and the plaintiff in possession."

Christy *vs.* Scott, 14 How., 282, was an action which originated in the State of Texas, which action this court expressly held was governed by the principles of the common law regulating the merits of a case in a trial of ejectment. That case came up upon a writ of error to the district court to review a judgment of that court on questions of law raised by the plaintiff's demurrer to certain pleas of the defendant. These pleas did not aver that the defendant had any title,

but set up certain supposed defects in the plaintiff's title. After quoting one of these pleas, Mr. Justice Curtis, in delivering the opinion of the court, said:

"According to the settled principles of the common law, this is not a defense to the action. The plaintiff says he was seized in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder cannot enter on a person actually seized and eject him and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practiced (Jackson *vs.* Boston and Worcester Railroad, 1 Cush., 575), or by an ejectment (Allen *vs.* Rivington, 2 Saund. R., 111; Doe *vs.* Read, 8 East., 356; Doe *vs.* Dyeball, 1 Moody & M., 346; Jackson *vs.* Hazen, 2 Johns., 438; Whitney *vs.* Wright, 15 Wend., 171), or he may maintain trespass (Catteris *vs.* Cowper, 4 Taunt., 548; Graham *vs.* Peat, 1 East., 246)."

In Gaines *vs.* New Orleans (6 Wall., 642, 715), Mr. Justice Davis, in delivering the opinion of the court, said:

"The defendants, equally with the complainant, claim title from the same common source. This is clear from the pleadings and proof. If, therefore, both parties claim title from the same person, neither is at liberty to deny that such person had title. On this point the Louisiana authorities are uniform. The rule is the same in equity as at law, and is well stated in Garrett *vs.* Lyle, 27 Ala., 589. The court in that case say: 'We do not deny in equity as well as at law the plaintiff must recover upon the strength of his own title; but because this is the rule it does not follow he must show a good title against all the world; it is enough that he shows a right to recover against the defendants. And there are

many cases in which he has this right, although another person must recover it from him.'"

Burt *vs.* Panjaud, 99 U. S., 180, was an action of ejectment which came up from the circuit court for the northern district of Florida. In that case the plaintiff made no proof of title except certain deeds to her and possession thereunder, no attempt being made to show that the grantors in the deeds had either title or possession. The defendant set up no title in himself. Mr. Justice Miller, in delivering the opinion of the court, said:

"We think there was sufficient evidence as to both lots of plaintiff's possession under claim of ownership. The deed from Mordecai and Kerr, with her actual residence on lot 4, and payment of taxes, was clearly sufficient to establish such possession. So, also, as regards the other lots, the witness who paid the rent was her tenant. The payment of the rent to a man who professed to act as her agent bound the tenant to her as such, and he could not have disputed her title. It was her possession. This was corroborated by the payment of taxes and the absence of any proof of abandonment or loss of possession prior to defendant's tortious entry. It was sufficient for the jury, in the absence of any pretense of right by defendant.

"This principle is so well settled in the law of ejectment and trespass *quare clausum fregit* as to need no citation of authority. It will be found laid down by Mr. Greenleaf in 2 Greenl. Ev d., sect. 311, that either actual possession of the premises or receipt of rent is *prima facie* evidence of title in fee; also sects. 618, 618*a*. (See also Hutchison *vs.* Perley, 4 Cal., 33; Nagle *vs.* Massey, 9 *id.*, 426)."

In referring to the foregoing case in their brief, counsel for the plaintiff in error seem to attach much importance to the fact that at the trial the jury were instructed that if they found that the possession of the plaintiff in that case had continued for *seven years* it was sufficient to entitle her to recover against a trespasser. There is nothing in the report of the case indicating that the period of seven years had any

particular potency. It was mentioned simply because that was the length of time that the plaintiff in that particular case had had possession. Certainly, unless such possession has continued long enough to create a bar against an action by the real owner, possession for seven years is of no more effect than possession for seven days; and it is obvious, from the opinion of this Court in that case, that it laid no stress whatever on the fact that the possession had continued for seven years. No such distinction as is indicated here by our learned opponents is to be found or even suggested in any decided case.

Finally, this whole matter was again gone over most thoroughly by this court in the case of Sabariego *vs.* Maverick, 124 U. S., 296, and the court again held that, by the common law, prior possession of the plaintiff is sufficient to entitle the plaintiff to recover in an action of ejectment where the defendant is a mere intruder. The opinion of this court in that case is quoted at length by the Court of Appeals in its opinion, and will be found on pages 171 to 174 of the record. It will be seen that a leading case in favor of the doctrine laid down by this court is Smith *vs.* Lorillard, 10 Johns., 338.

It is claimed, however, in the brief of our opponents, upon the authority of De Vaughn *vs.* Hutchinson, 165 U. S., 566, and other cases in this court to the same effect, that, in cases involving title to real estate, the law of the State where the land lies, as *evidenced by the decisions of its judicial tribunals*, is a rule of property and binding on this court; that in Maryland it has been uniformly held that in an action of ejectment the plaintiff must establish a flawless title whether the defendant be an intruder or not; that this supposed principle of law was the law of the District when it was ceded by Maryland, and that that has continued to be the law of the District until the decision of the Court of Appeals in this case, and that, in delivering the opinion of that court in this case, Mr. Justice Morris said (Rec., p. 174):

"It is very true that in the State of Maryland a very different doctrine has been adopted, and consistently adhered to, and the rule of the case of Smith *vs.* Lorillard has been repudiated (Mitchell *vs.* Mitchell, 1 Maryland, 44). And it is likewise true that the doctrine of the courts of Maryland, as expounded in the case just cited, has generally been understood to be the law of this District in reference to actions of ejectment."

On this supposed foundation counsel for the plaintiff in error contend that the Court of Appeals erred in following the decisions of this court, and especially its decision in Sabariego *vs.* Maverick, 124 U. S., 296.

We submit, on the contrary, that the law of the State of Maryland on this subject, on the 27th of February, 1801 (2 Stat., 105), when Congress declared that the laws of that State should continue in force in the District, was in nowise different from that laid down by the decisions of this court above cited; that there is not to be found in the reports of judicial decisions in the District any case which tends to sustain the position of opposing counsel, and that even in the State of Maryland since 1801 it has never been held that in an action of ejectment a mere intruder can put the plaintiff, who has had prior possession, to proof of a good title.

Section 3 of the bill of rights of Maryland, which was affirmed by the first constitution of the State, provided that the people of Maryland should be entitled to the common law of England. (See these documents, prefixed to the first volume of Kilty's Laws of Maryland.)

This court, in the cases which we have cited, and which the Court of Appeals in this case followed, has, as we have seen, repeatedly decided that by the common law prior unabandoned possession is all that a plaintiff need show in an action of ejectment as against a defendant who has entered without an honest claim of title. We might well rest this branch of the argument on these decisions. We

proceed to refer, however, to a series of decisions in England, beginning in 1594 and terminating in 1865, which sustain the conclusions so often reached by this court.

COMMON LAW.

In Read and Morpeth *vs.* Erington, Cro. Eliz., 321, which was decided in 1594, the action was ejectment. The defendant asked that the jury be instructed to render a verdict for him because the land was found in hands of "farmors and lessees" by virtue of leases made before the plaintiffs' lease, and it was not found that their leases were ended.

"But the court conceived this not to be material, it being not found that the defendant claimed under the lessees; and the plaintiff having entered and the defendant entering upon him, this is an ejectment of the plaintiff for which the plaintiff shall punish him."

In the same year was decided the case of Bateman *vs.* Allen, Cro. Eliz., 437. In that case the action was also ejectment. The defendant's counsel argued that the plaintiff's lease was void because in the special verdict which was rendered in the case it was not found that one Rhodes, who was conusee of a fine, had been expelled, and if he was in possession the lessors of the plaintiff could not have been in possession, and so could not have made a valid lease.

"But all the judges held it to be good enough; for it shall not be intended that Rhodes was upon the land, but that they (the lessors of the plaintiff) by their entry gained the possession, and though they be in as disseisors their lease is good to the plaintiff, and the defendant without title is not to eject him. Wherefore, without any regard to the matter in law, the plaintiff had judgment to recover."

In Allen *vs.* Rivington, 2 Saund., 111, which was decided in 1678, the action being ejectment, the defendant sought to raise certain questions which involved the construction of a

will under which the plaintiff derived title; but the court held that it was unnecessary to decide such questions, "Because it appeared upon the record that the lessor of the plaintiff had a priority of possession and there was not any title found for the defendant * * * And then the priority of possession alone gives a good title to the lessor of the plaintiff against the defendant, and all the world, excepting against the heir of the devisor."

In Doe *vs.* Anderson, 1 Stark, 262, which was an ejectment case brought before Lord Ellenborough in 1816, it appeared that the defendant had been in possession during the year 1814. The plaintiff showed only that one Strube had been in possession from 1809 to 1814, and that in 1815 the plaintiff's lessor purchased Strube's title at an execution sale. Strube's interest was derived under a lease from one Rogers, which lease was made in 1809. There was no evidence as to Rogers' title. At the close of the plaintiff's evidence the defendant made a motion that the plaintiff be nonsuited. The only reply made on behalf of the plaintiff to this motion was that the defendant's *prima facie* title inferred from his possession had been rebutted by showing the antecedent possession of Strube, under whom the plaintiff's lessor claimed. The motion for a nonsuit was overruled.

In Doe *vs.* Dyball, 3 C. & P., 610, which was an action of ejectment tried before Lord Tenterden, Chief Justice, in 1829, the defendant's counsel assailed a deed under which the plaintiff got his title. To this objection Lord Tenterden said:

"Suppose there had been no deed at all put in. We find that in 1826 a tenant of the lessor of the plaintiff had the key delivered to him when he went in and that he had peaceable possession of this room until the defendant came in November, 1827. That is sufficient proof of title as against a man who comes and takes forcible possession at three o'clock in the morning. The plaintiff is entitled to a verdict."

In Doe *vs.* Webber, 1 Ad. & El., 119, which was an action of ejectment heard before Lord Denman, Chief Justice, and Littledale and Parks, judges, in 1834, all that appeared was that the defendant's possession had been preceded by the plaintiff's possession, and that the possession of neither had lasted twenty years. The only evidence in the case as to title was offered by the defendant and ruled out. Thereupon the plaintiff had a verdict. The law seems to have been so well settled on the subject at this time that the point is not discussed. It appears to have been taken for granted that when the defendant's evidence as to his title was ruled out, the plaintiff was entitled to a verdict as a matter of course, by virtue of his prior possession.

In Davison *vs.* Gent, 38 E. L. & Eq., 469, which was an action of ejectment brought in the court of exchequer before Pollock, Ch. B., Bramwell, B., and Watson, B., the defendant undertook to take advantage of a defect in the plaintiff's title, and all three of the judges, in separate opinions, held that the plaintiff's prior possession was sufficient against the defendant, because the latter was a mere intruder. Pollock, Ch. B., said:

"I cannot assent to the notion that where a party has a right to maintain an action of ejectment by reason of his possession, if he attempts also to show title and discloses a flaw in his title, he cannot recover by reason of his possession. He may say, 'I claim to recover both by reason of my title and my possession; and failing in one, I will rely upon the other.'"

In Asher *vs.* Whitlock, L. R., 1 Q. B., 1, which was an action of ejectment, determined in 1865, the same doctrine was laid down by Cockburn, Ch. J., and Mellor and Lush, JJ. In that case Chief Justice Cockburn said:

"I take it as clearly established that possession is good against all the world, except the person who can show a good title, and it would be mischievous to change this established doctrine. In Doe *vs.* Dyball (E. C. L. R., vol. 22) one

year's possession by the plaintiff was held good against a person who came and turned him out, and there are other authorities to the same effect. * * * All the old law on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee. * * * We know to what extent encroachments on waste lands have taken place, and if the lord has acquiesced and does not interfere, can it be at the mere will of any stranger to disturb the person in possession?"

The next question is whether the common law on this subject had been changed or modified by the Maryland courts prior to February 27, 1801.

The first reports of decisions of the Maryland courts are the four volumes of Harris and McHenry, which were not published until 1809. The title page states that they contain all decisions of the provincial courts from 1700 to the time of the American Revolution. In fact, the earliest case reported was decided in 1658. In very few of the cases is the opinion of the court given, the result merely being stated. The preface shows the difficulties which the reporters encountered in searching through musty records for decisions made from thirty-five to one hundred and fifty years before. The next Maryland reports are the four volumes of Harris and Johnson (Reverdy). The first of these volumes was published in 1821. They purport to contain decisions of the court of appeals and general court from 1800 to 1826. From 1826 to the present time the Maryland decisions have been fully and promptly reported. There are no reports whatever of the cases decided between 1776 and 1800.

It is obvious that very little reliance is to be placed upon any supposed changes in the common law made in Maryland prior to 1801; and when we come to examine the cases in the four volumes of Harris and McHenry, which is our main source of information on this subject, we find that the

only cases which in any way touch the question which is involved here are authorities in our favor.

Thus in Hutchins' Lessee *vs.* Erickson, 1 H. & McH., 339, which was an action of ejectment, decided in 1769, in the provincial court of Maryland, the plaintiff's counsel, as will appear from his brief, relied upon the proposition thus stated by him: "Prior possession is a sufficient title in ejectment, unless a better title can be shown." In support of this proposition they referred to several of the English decisions hereinabove cited. The report states that the defendant's counsel, on the other hand, claimed "priority of possession is not a good title in ejectment." The plaintiff had judgment in his favor, which was affirmed by default in the court of appeals. This case, if these reports can be relied upon at all, is an express decision of the very point in issue in our favor. The only other point made by the plaintiff's counsel was to show that the defendant's title was not good, he claiming under an escheat patent, without having shown that the tenant, upon whose supposed death the land reverted to the proprietary, was dead. The plaintiff could not have succeeded unless the court had decided both the questions involved in his favor.

These reports as originally published contain no syllabi, but as republished by William T. Brantly in 1883, the syllabus of this case is as follows:

"Possession is a good title in ejectment against a defendant claiming under an escheat grant, there being no proof of the death of the prior grantee without heirs and the defendant having forcibly dispossessed the plaintiff.

"No presumption will be made that the original grantee of land died without heirs in order to support an escheat grant."

In House's Lessee *vs.* Beatty, 3 H. & McH., 182, which was an action of ejectment, decided in 1794, it appeared that by an act of assembly the commissioners had been authorized to sell certain lots in Georgetown, then a part of Maryland,

upon the condition that the purchaser of any lot should build a house upon it within two years from the date of the purchase. A lot had been sold to one Beatty. Afterwards John House applied to the commissioners to purchase the same lot, on the ground that it had become forfeited by Beatty's failure to build within two years. The result of the proceedings was that House became the owner of the lot, out Beatty remained in possession and erected a building upon it. Thereupon the action was brought by House's lessee against Beatty to recover possession. It was held that House was entitled to the lot because Beatty was in as a wrong-doer, and that as he had kept House, the real owner, out of possession, the building which he had erected was to be taken as erected by House, who was entitled to judgment. This judgment was affirmed by the court of appeals in 1796.

Next, as to "judicial decisions" in the courts of the District of Columbia.

In no reported case in the District from 1801 down to the present time has it been held that when the defendant in an action of ejectment appears to be a mere intruder he can put the plaintiff, who has been in possession or who claims under those who have been in possession, to prove his title. All the decisions, so far as they relate to this point at all, are to the contrary.

In Edmonston *vs.* Lovell, 1 Cr. C. Ct., 103, which was an action of trespass *quare clausam fregit*, decided in 1802, the court decided that the execution of a deed of bargain and sale of land need not be proved by subscribing witnesses if the deed has been duly acknowledged and recorded, "*and that possession alone was sufficient to maintain an action against one who has no title.*"

In Worthington's Lessee *vs.* Etcheson, 5 Cr. C. Ct., 302,

which was an action of ejectment, determined in 1837, the report states the case as follows:

"The defendants contended that the plaintiff could not recover without showing notice to the defendants to quit, but the court decided that the defendants were to be considered as intruders, and therefore not entitled to such notice."

In Anderson *vs.* Smith, 2 Mackey, 279, which was an action of ejectment, Mr. Justice Cox, in delivering the opinion of the supreme court of the District of Columbia in general term, laid down apparently as a proposition which was so plain that it could be taken for granted, that it is only where there is no proof of possession that the plaintiff must trace back his paper title to the State or the United States.

Finally, the Court of Appeals itself, in a case decided as late as February, 1897, laid down precisely the doctrine for which we are contending, in direct opposition to what in the present case it says was "understood" to have been the law in the District of Columbia. It is due to that court to state that in the argument of the present case the previous case to which we now refer was overlooked by counsel and was not brought to the notice of the court. The case in question is Staffen *vs.* Zeust, 10 Appeals D. C., 260. On page 269 Chief Justice Alvey, in delivering the opinion of the court in that case, said:

"The action of ejectment is, strictly speaking, a possessory action, the plaintiff being required to show a present legal right to the possession of the premises as against the defendant. This may be done by evidence to establish the fact of prior possession by the plaintiff, even though that possession be for a time less than twenty years; such possession being sufficient to give rise to the presumption of title as against a defendant who has subsequently acquired possession by mere entry without any lawful right; provided, however, that such prior possession of the plaintiff was not voluntarily relinquished without the *animus revertendi*. Allen *vs.* Rivington, 2 Saund., 111; Smith *vs.* Lorillard, 10 Johns., 338–356;

Christy *vs.* Scott, 14 How., 282–291; Sabariego *vs.* Maverick, 124 U. S., 296–300."

It will be seen that this opinion is based upon the leading English case of Allen *vs.* Rivington, in 2 Saund., and the leading American case of Smith *vs.* Lorillard, 10 Johns., as well as upon two of the decisions of this court, and that the opinion was delivered by a very able jurist, who had been a member of the court of appeals of Maryland for many years before he became chief justice of the Court of Appeals of this District. It is manifest that in February, 1897, the Court of Appeals did not consider itself obliged to decide this question in the way it did merely because of the decisions of this the superior court, but that it understood that it was laying down a doctrine that was a part of the law of the District of Columbia before those authoritative decisions were rendered.

In view of all the foregoing, it seems to us to be immaterial what the court of appeals of Maryland may have held to be the law on this subject after 1801. The decisions of that court after that date are entitled to great respect, but are not binding in this District. (See Van Ness *vs.* Hyatt, 13 Pet., 299; Thaw *vs.* Ritchie, 5 Mackey, 200.)

The court of appeals of Maryland has itself held that the decisions of the courts of England as to the common law rendered after the Revolution are not binding on it. Thus in Greenwood *vs.* Greenwood, 28 Md., 369–381, that court said:

"Our ancestors unquestionably brought with them to this country that common law as their birthright, and all our constitutions have sacredly guarded it as one of the *rights* of the people, but the courts which the same people have established to administer that law are made the sole authoritative expositors of it for *them*. Decisions in England made since the American Revolution while entitled to the greatest

respect are not *binding* authorities upon this court; on the contrary, the practice of this, as of other courts, is to receive their own decisions only as of binding force."

Nevertheless, we have examined the Maryland cases relied upon in the brief on behalf of the plaintiff in error in this case, and we find that they all simply lay down the general rule that in an action of ejectment the plaintiff must succeed upon the strength of his own title and not upon the weakness of the defendant's, and that he must trace his title back to the original proprietary or to the State. This is simply reaffirming the doctrine which this court has recognized in all the cases upon which we rely and which it has expressly laid down in many other cases, some of which are cited on that point on page 29 of the brief for the plaintiff in error.

The question here is whether, when the defendant is a wrong-doer, a trespasser, an intruder, there is an exception to the general rule. None of the cases in Maryland cited in the opposing brief discuss this question at all. In none of them, so far as we can see, did the facts of the case give opportunity for such a question to be raised. In all of them the defendant made at least a plausibly honest claim of title. And among the Maryland reported cases since 1801 there are several which indicate that if this precise question should be presented to the court, it would recognize the exception to the general rule which is involved in the case at bar.

Thus, in Norwood *vs.* Shipley, 1 H. & J., 295, decided in 1802, it was held that in an action of trespass *q. c. f.*, the plaintiff must show title or he must show "that he was in the actual possession of the place where the trespass was committed and at the time when it was committed."

In Cockey *vs.* Smith, 3 H. & J., 20, decided in 1810, the main question in the case was as to the validity of the defendant's title. She claimed under a grant without producing it or showing that it was lost, and without showing any

rightful possession under it. She started her title with a deed from one Clark. The court said:

"It is not stated that Clark was ever in possession of the land; and if he was, he was an intruder and his deed could not operate to transfer any right to the land, for he had no right or interest to transmit; and the entry and possession of Franklin under Clark's deed was an intrusion, the land being vacant land."

In Hoye *vs.* Swan's lessee, 5 Maryland, 237, decided in 1853, the principal question was whether, under the circumstances of that case, the defendant's adverse possession of a part of the disputed tract was to be held constructively co-extensive with the tract, or to be confined to that part which he had actually enclosed. It was held that the defendant's grantor was a mere intruder and could take nothing except what he actually got within his grasp, and the court says that it adopts the "obvious and important distinction which the reported cases and elementary writers recognize between a possession taken by a wrong-doer and one taken by a person under title."

In Tyson *vs.* Shuecy, 5 Maryland, 540–550, decided in 1854, the case being an action of trespass *q. c. f.*, the court held that in an action of that character "possession under a parole lease or bare possession alone as against a wrong-doer, without any title whatever, is sufficient to sustain the suit."

In Sanders *vs.* McDonald, 63 Maryland, 503, decided in 1875, which was an action of ejectment, Chief Justice Alvey, in delivering the opinion of the Court of Appeals, said:

"And as a general principle, with some few well-defined exceptions, to enable the defendant in ejectment to defend his possession successfully, either upon his own title or the title of a third party, that title must as a general rule be shown to be a good and subsisting legal title and superior in law to that set up by the plaintiff; for otherwise it opposes no legal bar to the right of the plaintiff to recover (Hickey's Lessee *vs.* Stewart, 3 How., 750)."

In the case in this court thus cited and approved it was held, as we have seen, that a defendant in ejectment must show a title upon which he could succeed if he were the plaintiff.

As to the case of Mitchell *vs.* Mitchell, 1 Maryland, 44, decided in 1851, which seems to be principally relied upon here as indicating what was the law in Maryland on the point now in controversy, and which is referred to by the Court of Appeals in its opinion in this case (p. 174), the plaintiff produced no patent from the original proprietors or from the State, but relied upon possession. Elizabeth Mitchell and those under whom she derived title were in adverse possession from 1817 until her death, in 1841. She was a life tenant under the will of her husband, James Mitchell, who died in possession. The question was, where did the title go on Elizabeth's death? The plaintiff's lessor was James' sole sister. The defendant was a half-brother of James Mitchell. He took possession on Elizabeth's death and claimed that James left no brother or sister, and that the title descended to his, defendant's, son. It will be seen that the plaintiff in the case had never been in possession after the death of James Mitchell, and that both parties claimed under him. It was therefore one of those cases where both parties claimed under the same person, and the only question was which had the better title? The defendant was not a mere intruder. He entered under a claim, perfectly honest so far as the record discloses, that James had died leaving no heirs of the whole blood, and that the title had descended to the heir of the half blood, for whom he took possession. Nowhere in the opinion of the court did it directly or indirectly pass on the question as to the extent to which the plaintiff must go in an action of ejectment where the defendant had taken possession without any claim or title whatever.

Counsel for the plaintiff in error, throughout that part of their brief which deals with the question we are discussing, assume that the rule against intruders upon which we rely is

"exceptional;" that it is "the New York rule;" that it is contrary to the general doctrine upon the subject in this country. We have taken the trouble of looking at the cases on this subject in the different States of the Union, and so far we have been unable to find a single case in which any court in this country, in an action in which the defendant was merely an intruder, has held that in an action of ejectment he can take advantage of defects in the title of the person whom he has ousted. On the contrary, the universal doctrine in the United States seems to be that which has been so often promulgated by this court. Of the numerous cases in the State courts on this subject we refer to the following:

Plummer *vs.* Buckman, 55 Me., 103 (1866).
Austin *vs.* Bailey, 37 Vt., 219–225 (1864).
Breck *vs.* Young, 11 N. H., 485.
Slater *vs.* Rawson, 6 Metc. (Mass.), 439.
Hubbard *vs.* Little, Jr., 9 Cush., 475 (1852).
Smith vs. Lorillard, 10 Johns., 338.
Jackson *vs.* Denn, 5 Cowan, 200.
Whitney *vs.* Wright, 15 Wend., 172 (1836).
Thompson *vs.* Burhans, 79 N. Y., 97.
Hunter *vs.* Starin, 26 Hun., 529 (1882).
Mayor, etc., *vs.* Carleton, 113 N. Y., 284 (1889).
Den vs. Morris, 7 N. J. L., 7 (1824).
Mobley *vs.* Brunner, 59 Pa. St., 483.
Turner *vs.* Reynolds, 23 Pa. St., 199–205.
Hull *vs.* Campbell, 56 Pa. St., 154.
Lessee of Holt's Heirs *vs.* Hemphill's Heirs, 3 Ohio, 237.
Doe vs. West, 1 Blackf., 133.
Davis *vs.* Easley, 13 Ill., 192 (1851).
Mason *vs.* Park, 3 Scammon, 532 (1842).
Barger *vs.* Hobbs, 67 Ill., 597.
Benefield *vs.* Albert, 132 Ill., 665.
Harrell *vs.* Enterprise Bank, 183 Ill., 541.
Shaw *vs.* Hill, 79 Mich., 86 (1889).

Van Auken *vs.* Monroe, 38 Mich., 725.
Bates vs. Campbell, 25 Wis., 613.
Rau *vs.* Minnesota Valley R. Co., 13 Minn., 442.
Sherin *vs.* Bracket, 36 Minn., 153 (1886).
Simpson *vs.* Boring, 16 Kan., 251 (1876).
Douglass *vs.* Ruffin, 38 Kan., 530 (1888).
Duffey *vs.* Rafferty, 15 Kan., 17.
Hestres *vs.* Brannan, 21 Cal., 423.
Donahue *vs.* Gallavan, 43 Cal., 573.
Baum *vs.* Reay, 96 Cal., 465.
Toppscott vs. Cobbs, 11 Gratt., 172 (1854).
Sowder vs. McMillin's Heirs, 4 Dana, 456 (1836).
Seymour vs. Creswell, 18 Fla., 29.
Simmons *vs.* Spratt, 20 Fla., 495.
Goodwin *vs.* Markwell, 37 Fla., 466.
Jackson *vs.* Haisley, 35 Fla., 587–606, etc.
Hartley *vs.* Ferrell, 9 Fla., 374.
Bagley *vs.* Kennedy, 85 Ga., 706 (1890).
Boynton *vs.* Brown, 67 Ga., 396.
Thape *vs.* Atwood, 100 Ga., 599 (1897).
Badger *vs.* Lyon, 7 Ala., 564 (1845).
Dingey *vs.* Paxton, 60 Miss., 1048 (1883).
Trager *vs.* Shepherd, 18 So. R., 122, Sup. Ct. Miss., (1895).
Wilson *vs.* Palmer, 18 Tex., 595 (1857).
White *vs.* Keller, 114 Mo., 483 (1892).
Bains *vs.* Bullock, 129 Mo., 121 (1895).
Weaver *vs.* Rush, 62 Ark., 51.
Carnall *vs.* Wilson, 21 Ark., 67 (1860).

Those of the above cases which are italicized will be found especially instructive.

Counsel for the plaintiff in error make the sweeping assertion that "the exceptional cases in those jurisdictions which justify a recovery on proof of prior possession are all cases of actual, visible possession, and not where the entry of the defendant was upon vacant and unoccupied land." This exceedingly comprehensive statement is not supported by reference to any authority whatever. Even if we should agree with counsel that it is the law, it would not help their case, because here there was both a forcible entry and a forcible detainer. The plaintiff's brother, James A. Ashley, testified that the fence which Bradshaw after his original entry put around the property in question was demolished by the witness, and that three or four days afterwards he found that somebody had erected a brick structure on the land (61). Another witness testified that Bradshaw superintended the erection of this building; that he, with a gang of men who had some kind of weapons in their hands, was there; that these men were inside and said it was a fort, and said they were going to hold the fort, the street in the meantime being crowded with people watching the performance (63).

Counsel for the plaintiff in error follow the observation which is quoted above by the statement that there is no evidence tending to show that the Ashleys had ever been in possession of three of the four lots in controversy, and that the evidence showed the other to be "vacant and unoccupied for seven years prior to the defendant's entry." But by reference to the instruction which the court gave to the jury, at the request of plaintiff's counsel (140), it will be seen that before the jury could find a verdict for the plaintiff they were required to find that the plaintiff and those under whom he claimed had been in actual possession and had continued to exercise acts of exclusive ownership, such as paying the taxes on the property, renting the same or parts thereof to tenants from time to time, selling sods therefrom, and giving permission to pasture cows thereon, and generally

that the plaintiff never abandoned his possession. The evidence showing these acts of possession and ownership will be found on pages 42–53, 54, 60–63, 67–78 of the record.

Of the numerous cases which we have cited in support of our contention as to the rule against intruders, there are but few in which there have been a forcible ejection of one in actual possession. No such distinction as that which counsel suggest is made, so far as we can recall, in any of the cases. If the plaintiff, either in person or by those under whom he claims, has had possession, either actual or constructive, and he has not abandoned his claim to the property, he has a right to turn out an intruder by an action of ejectment. This is the principle running through all of the cases.

In the leading case of Smith *vs.* Lorillard, 19 Johnson, 338, the plaintiff had been out of possession for several years before the defendant took possession. In many of the cases which we have cited it is expressly stated by the court that for the purpose of maintaining an action of ejectment against an intruder it is not necessary that the plaintiff should have such possession as would have amounted to a disseisin of the real owner. On this point see, for instance, Slater *vs.* Rawson, 6 Metcalfe, 439; Hubbard *vs.* Little, Jr., 9 Cush., 475.

And in a greater number of the cases the lands in controversy were those upon which there were no buildings and around which there were no inclosures, the only possession had by the plaintiff being that constructive possession by which ordinarily wild and vacant lands are held by the owners. (See Christy *vs.* Scott, 14 How., 282; Asher *vs.* Whitlock, L. R. 1 Q. B., 1; Hunter *vs.* Starin, 26 Hun., 529; Mayor *vs.* Carleton, 113 N. Y., 284; Davis *vs.* Easley, 13 Ill., 192; Van Auken *vs.* Monroe, 38 Mich., 725.)

In the brief on behalf of the plaintiff in error in this case no attempt is made to give any reason why a defendant who has wrongfully taken possession of another man's land should be allowed to defeat the action of the person whom he has turned out of possession by requiring the person disseized to prove a perfect title. It is indeed suggested at the present time in this District that there is a statute providing for cases of forcible entry and forcible detainer which gives to the person dispossessed a summary remedy. But this statute was not enacted until 1864, and the question remains whether the common law on this subject was so defective and unreasonable that any person holding real estate was subject to lose it at any time by having another turn him out of possession, and then point to a flaw in his title. The flagrant injustice of such a rule is apparent. That it would tend to produce breaches of the peace is obvious enough. A man turned out of possession in this way by the strong hand and having no way of recovering possession through the law would naturally meet force with force.

Real estate is but one species of property. There is no reason for any distinction in this regard between it and personal property. Yet it seems always to have been a part of the common law, and the rule in England and everywhere in this country, that a defendant who without any claim of title in himself has taken possession of the personal property of another, when called to account, either in action of trover, trespass, or replevin, must answer to the person from whose possession he took the article, without regard to that person's title. He may hold it as owner, as bailee, or, for that matter, he may himself have acquired it by wrong, notwithstanding it is his as against one who has taken it from him without any honest claim of title whatever (Cobbey on Replevin, sec. 60; 2 Greenleaf Ev., sec. 637).

Again, an exception everywhere recognized to the general rule that the plaintiff in ejectment must show a good title in

himself, without reference to the weakness of that which is set up by the defendant, is that when two claim under the same person the plaintiff need not go farther back than to the common source of title. In all such cases the court, or, if there be a question of fact involved, the court and jury, decide merely which has the better title, assuming that the title was perfect in him under whom both the parties claim.

Gaines *vs.* New Orleans, 6 Wall., 715.

Let us suppose now that an action of ejectment is brought by A against B, who knows that he and A both claim under C. A proves his title derived from C and rests his case. B's counsel discover that A's title derived from C is better than B's title, derived from the same source. Thereupon they decline to set up any claim of title in themselves, relying only upon their possession, which must have been obtained by turning A out of possession, or there would have been no ouster. A is thereupon called upon to prove C's title, and it is found to be defective. A verdict for the defendant follows, as a matter of course. The astonishing conclusion is that a man who has entered under an honest claim of title finds that if he makes that defense he will be defeated, but if he refuses to do so and claims that he is a mere intruder he keeps the land.

Absurd as this may seem, it is precisely the conclusion reached by the court of appeals of Maryland in Ahern *vs.* White, 39 Maryland, 409. In that case both parties claimed title from the same third party. The plaintiff's title turned out to be the better one. The defendant's counsel insisted, however, that the plaintiff had not shown a good title by grant from the State and mesne conveyance down to himself, as is required ordinarily in actions of ejectment in Maryland, and they particularly relied upon the case of Mitchell *vs.* Mitchell, 1 Maryland, 44. In its opinion the court said that this difference would have been fatal if the

defendant had rested its case on the plaintiff's proof without introducing his own title; but that as *he* had shown that both claimed from the same party, all that the court had to do was to decide which had the better title. The court gave as a reason for this conclusion that—

"There are many cases in which the well-settled rule of ejectment law, that to enable a plaintiff to recover he must show title regularly deduced from the State or adverse possession, for twenty years or more, is dispensed with."

We have often heard that a party must come into equity with clean hands. We have never heard that in a court of law in any case a party may improve his position by showing that his hands are not clean.

It will be seen that the counsel for the plaintiffs in error in their brief make no claim that Bradshaw was anything but an intruder. In their statement of the case they parade a list of the deeds which they offered in evidence, but they nowhere suggest that these instruments of themselves tended to show that Bradshaw stood in the position of one entering upon land believing, in good faith, that he had a right to do so. Bradshaw's first entry upon the land occurred in March, 1889 (61). The earliest of the deeds which he offered in evidence bears date the 2d day of August, 1889 (124). Bradshaw's real authority for taking possession of this land is the extraordinary contract dated January 21, 1889, between certain persons who describe themselves as the heirs of George Walker, the original proprietor, and J. Augustus Taylor and John H. Walter (127 to 130). By this instrument Taylor and Walter undertook, for the parties with whom they contracted, at their own expense to get and defend possession of a large number of lots in this city, Taylor and Walter being bound to account to the supposed "heirs" if the trans-

action resulted in a profit, but to stand the loss themselves should they fail through force or intimidation to extort anything from the rightful owners of any of the lots. That such a paper as this is not a muniment of title in this District and cannot even be offered in evidence as such, even where it is made with persons who are proved to be in a position to claim title to the land in controversy, was decided in Peck *vs.* Heurick, 6 Ap. Cas. D. C., 273; 167 U. S., 624.

This remarkable document starts out with a recital that the first parties—some seventeen in number—"have by deed of even date herewith conveyed said real estate to the said John H. Walter" (127). Yet no such deed was offered at the trial and there was no evidence that they or any of them ever existed.

Even if the deeds offered in evidence had been deeds from persons claiming to be the heirs of a former owner to Bradshaw or his confederate, Walter, and had been executed prior to March, 1889, the deeds themselves, without any proof that the grantors were in fact such heirs, manifestly would not tend to prove that Bradshaw entered under a claim of title made in good faith. Without such evidence the tendency would have been the other way, because the natural inference would be that the deeds were from fictitious heirs and were obtained for the purpose of giving the appearance of good faith to a transaction known to be wrongful.

These deeds, without proof of heirship, were not properly admissible in evidence at all.

Van Auken *vs.* Monroe, 38 Mich., 725.

It is respectfully submitted that the judgment below is right and that it should be affirmed.

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